NO. 80771-0

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN L. HALE AND ROBBIN HALE,

Appellants,

vs.

WELLPINIT SCHOOL DISTRICT NO. 49,

Respondent

APPELLANTS' OPENING BRIEF

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I. ASSIGNMENT OF ERROR

1. The trial court erred in entering the Order dated September 21, 2007 Denying Plaintiff's Motion for Reconsideration, and affirming its prior Order Granting Defendant's Motion for Partial Summary Judgment, dismissing plaintiff's claim of disability discrimination under RCW 49.60.180.

ISSUES RELATED TO ASSIGNMENT OF ERROR

1. Whether the legislature violated the separation of powers doctrine in providing for retroactive application of the definition of "disability" in RCW 49.60.040(25)?

2. Whether petitioner John Hale had a disability under the Washington Law Against Discrimination while he was employed with respondent Wellpinit School District from August 2002 through March 2003?

3. Whether the record demonstrates genuine issues of material fact concerning whether defendant Wellpinit School District breached its duty to accommodate petitioner's disability between August 2002 and March 2003?

II. STATEMENT OF THE CASE

1. Procedural History

Plaintiff John Hale brought this lawsuit against his former employer, the Wellpinit School District, alleging three separate causes of action: (1) disability discrimination under RCW 49.60.180, (2) negligent infliction of emotional distress, and (3) breach of contract. (CP 3-8). On December 28, 2006, defendant moved for partial summary judgment, seeking dismissal of plaintiff's claim of disability discrimination. (CP 9-10). Defendant argued that Mr. Hale did not have a disability under the definition of that term adopted by the Supreme Court in *McClarty v. Totem Electric International,* 157 Wn.2d 214, 137 P.3d 844 (2006). (CP 11-24). On May 3, 2007, the Stevens County Superior Court entered an Order Granting Defendant's Motion for Partial Summary Judgment, and dismissing plaintiff's disability discrimination claim. (CP 304-306)

In April 2007, the legislature passed Senate Bill 5340, enacting a comprehensive definition of disability for purposes of the Washington Law Against Discrimination. The legislature expressly rejected the definition of disability adopted by the court in *McClarty* and provided for retroactive application of the legislative definition of disability. Senate Bill 5340 went

into effect on July 1, 2007.

Plaintiff moved for reconsideration of the trial court's Order Granting Summary Judgment dismissing his disability discrimination claim. (CP 307-308). Plaintiff argued that the record demonstrated he had a disability, as that term was defined in Senate Bill 5340. (CP 309-331). The trial court denied Plaintiff's Motion for Reconsideration, holding that the separation of powers doctrine precluded retroactive application of the definition of disability adopted by the legislature in Senate Bill 5340. (CP 415-418, 419-421). Plaintiff sought discretionary review of that decision with the Washington Supreme Court. (CP 422-426). On December 19, 2007, this court granted Plaintiff's Motion for Discretionary Review.

2. Factual Background

Plaintiff John Hale was originally hired by the Wellpinit School District in February 2002. He was initially hired to provide technical support for the District's computer system. (CP 226-228). Subsequently, Mr. Hale was assigned to the Wellpinit Alliance Program at Fort Simcoe, outside of White Swan, Washington. (CP 169-172; 239).

By late summer 2002, Mr. Hale was experiencing significant difficulties in his work environment. On August 25, 2002, Hale wrote to

Wellpinit Superintendent Reid Reidlinger, and explained that the working environment was adversely affecting his health. (CP 118, 201). Plaintiff's August 25, 2002 letter advised Mr. Reidlinger that the workplace environment was making him physically ill, and he was seeking medical attention. (CP 201). Mr. Hale asked Mr. Reidlinger to intervene (engage in the interactive process). Id. Mr. Reidlinger ignored him. (CP 185-186; 247-248).

Mr. Hale's health condition continued to deteriorate and he sought medical attention. On December 20, 2002, his treating physician, Dr. Robert Wigert, directed a letter, "To Whom it May concern," which stated that Hale suffered from anxiety and depression, and that his condition was aggravated by the workplace environment. (CP 204). Mr. Hale provided Dr. Wigert's letter to Superintendent Reidlinger, and the Wellpinit School board, with a cover letter dated January 3, 2003. (CP 202-204). Defendant did not respond, and made no effort to engage in an interactive process to explore reasonable accommodation for Mr. Hale. (CP 254-263)

Finally, suffering from continued deterioration in his health, and having received no response from the District, Mr. Hale presented the District with another report from his physician dated February 17, 2003. (CP 276).

Dr. Wigert stated "Mr. Hale is no longer able to continue in his present employment due to the effects of the employment on his health issues." Id.

Mr. Hale then brought this lawsuit alleging claims of disability discrimination under RCW 49.60.180, negligent infliction of emotional distress, and breach of contract. (CP 3-8). On May 3, 2007, the Stevens County Superior Court granted Defendant's Motion for Partial Summary Judgment, dismissing plaintiff's disability discrimination claim. (CP 304-306). Relying on *McClarty v. Totem Electric,* supra, the court held that Mr. Hale did not have a disability for purposes of his WLAD claim. (CP 302-303).

The legislature rejected the *McClarty* court's definition of disability for purposes of WLAD claims by enacting Senate Bill 5340, effective July 1, 2007. Plaintiff moved for reconsideration of the summary judgment order dismissing his WLAD claim, arguing that he met the definition of disability adopted by the legislature in Senate Bill 5340. (CP 307-331). The legislature expressly provided for retroactive application of the newly enacted definition of disability. [2007 c 317 § 3]. Despite this legislative directive, the trial court held that the separation of powers doctrine precluded retroactive application of the definition of "disability" in Senate Bill 5340. (CP 415-418). The trial

court denied Plaintiffs' Motion for Reconsideration, and affirmed its summary judgment dismissal of the disability discrimination claim. (CP 419-421).

This court granted plaintiff's motion for discretionary review to consider the issue of whether the separation of powers doctrine precludes application of Senate Bill 5340 to causes of action occurring prior to the issuance of *McClarty v. Totem Electric International,* 157 Wn.2d 214, 137 P.3d 844 (2006).

III. ARGUMENT

A. RETROACTIVE APPLICATION OF SENATE BILL 5340 DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

1. The Separation of Powers Doctrine.

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments - the legislative, the executive, and the judicial - and that each is separate from the other. *Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173. (1994) Washington's constitution, much like the federal constitution, does not contain a formal separation of powers clause. *Id.*, 134-135. Nonetheless, the very division of our government into different branches has been presumed

throughout the state's history to give rise to a vital separation of powers doctrine. *See In the Matter of the Salary of the Juvenile Director,* 87 Wn.2d 232, 238-240, 552 P.2d 163 (1976). In *Carrick*, this court discussed the purposes and the proper application of the separation of powers doctrine:

> The validity of this doctrine does not depend on the branches of government being hermetically sealed off from one another. The different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government. *In re Juvenile Director,* 87Wn.2d at 239-240, 552 P.2d 163. The doctrine serves mainly to ensure that the fundamental functions of each branch remain inviolate.

125 Wn.2d at 135.

The separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread. *State v. Blilie,* 132 Wn.2d 484, 490, 939 P.2d 691 (1997); *In the Matter of the Salary of the Juvenile Director,* at 240. "The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogative of another." *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). As demonstrated infra,

retroactive application of Senate Bill 5340 neither threatens the independence or integrity of the judiciary, or invades the prerogative of that branch. Therefore, retroactive application of Senate Bill 5340 to disability discrimination cases which accrued prior to the court's decision in *McClarty v. Totem Electric International,* 157 Wn.2d 214, 137 P.3d 844 (2006) does not violate the separation of powers doctrine. The trial court's decision to the contrary should be reversed.

2. Senate Bill 5340 does not contravene this court's decision in *McClarty v. Totem Electric*.

In *McClarty* this court dramatically altered its prior jurisprudence with respect to disability discrimination claims under RCW 49.60 by adopting the definition of "disability" set forth in the Americans with Disabilities Act (ADA). The court held that a plaintiff bringing suit under the WLAD establishes that he has a disability if he has (1) a physical or mental impairment that substantially limits one or more of his major life activities; (2) a record of such impairment; or (3) is regarded as having such an impairment. 157 Wn.2d, at 220. At the time *McClarty* was decided, the WLAD did not define the term "disability." *Id.*, at 222, 137 P.2d at 848.

The Washington State Human Rights Commission ("HRC"),

however, had promulgated a regulation stating that "a condition is a 'sensory, mental or physical disability' if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question." WAC 162-22-020. Six years prior to its decision in *McClarty*, this court expressly rejected the ADA definition of disability, and held that an accommodation claimant under the WLAD satisfies the "handicap" or "disability" element of his claim by providing that (1) he or she has/had a sensory, mental, or physical abnormality and (2) such abnormality has/had a substantially limiting effect upon the individual's ability to perform his job. *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 641, 9 P.3d 787 (2000). Thus, this court's decision in *McClarty* adopting the ADA definition of disability, with its "substantial impairment of major life activity standard," represented a complete "about face" from its prior decision in *Pulcino*.

The legislature immediately responded to the *McClarty* decision by enacting Senate Bill 5340. "Disability" is now statutorily defined as a "sensory, mental, or physical impairment that: (i) is medically cognizable or diagnosable; or (ii) exists as a record or history; or (iii) is perceived to exist whether or not it exists in fact." RCW 49.60.040 (25)(a). The new definition of disability further provides that "for the purposes of qualifying for

reasonable accommodation in employment," an impairment "must have a substantially limiting effect upon the individual's ability to perform his or her job." RCW 49.60.040(25)(d)(i). Thus, unlike the ADA, the WLAD, as amended, does not require that a disability substantially limit a major life activity, but only that it substantially limit the ability to perform one's job, before a right to accommodate arises. The legislature's passage of Senate Bill 5340 essentially returned the state of the law to its status pre *McClarty*. *See Delaplaine v. United Airlines, Inc.,* 518 F. Supp.2d 1275 (W.D. Wash, 2007). In enacting this statutory definition of disability, the legislature provided:

> This act is remedial and retroactive and applies to all causes of action occurring before July 6, 2006 [the date of the *McClarty* decision] and to all causes of action occurring on or after the effective date of this act.

[2007 c 317 § 3].

A legislative amendment is presumed to operate prospectively unless (i) the legislature intended it to apply retroactively, (ii) the amendment is curative, or (iii) the amendment is remedial. *In re Personal Restraint of Stewart,* 115 Wn. App. 319, 332, 75 P.3d 521 (2003). The legislature expressly provided for retroactive application of Senate Bill 5340 to cases

which arose prior to the court's decision in *McClarty*. Absent constitutional concerns, Senate Bill 5340 applies retroactively to cases which arose prior to *McClarty*. See *Landgraf v. USI Film Products,* 511 U.S. 244, 280, 114 S. Ct. 1483, 128 L. Ed 2d 229 (1994). However, under the separation of powers doctrine, an amendment cannot be given retroactive effect if the new legislation contravenes a judicial decision that "authoritatively construes statutory language." *Stewart*, 115 Wn. App., at 335.

Retroactive application of Senate Bill 5340 does not violate the separation of powers doctrine for two reasons. First, the legislature expressly provided that cases which arose after *McClarty* and prior to the effective date of Senate Bill 5340 would be governed by *McClarty*. Therefore, with surgical precision, the court left the precedential effect of *McClarty* intact. Retroactive application of the new statutory definition of "disability" simply returns the law to the status quo as it existed prior to *McClarty*. *Delaplaine v. United Airlines, Inc.,* 518 F. Supp.2d, at 1279. Retroactive application of this legislation to cases which arose prior to *McClarty* neither "threatens the independence or integrity or invades the prerogatives" of the judiciary. *Carrick v. Locke,* 125 Wn.2d, at 135. Disability discrimination cases which arose after *McClarty*, but prior to the effective date of Senate Bill 5340, are

governed by *McClarty.* Retroactive application of the statutory definition of "disability" to cases that arose prior to *McClarty* does not contravene *McClarty,* and therefore does not violate the separation of powers doctrine.

Second, it is readily apparent that, in adopting the ADA definition of disability, "the McClarty court did not interpret an existing Washington statute, but rather imported a definition from a different source, namely federal law." *Delaplaine v. United Airlines,* 518 F. Supp. 2d, at 1279. The separation of powers problem arises only when retroactive application of new legislation contravenes a construction placed on the statute by the judiciary. *In re the Detention of Brooks,* 145 Wn. 2d 275, 287, 36 P. 3d 1034 (2001); *State v. Dunaway*, 109 Wn. 2d 207, 743 P. 2d 1237 (1987). Prior to the enactment of Senate Bill 5340 the legislature had not defined the term "disability" in the WLAD. See *McClarty,* 157 Wn. 2d at 222; *Pulcino v. Federal Express,* 141 Wn. 2d 629, 640, 9 P. 3d 787 (2000). Therefore, *McClarty's* adoption of the ADA definition of disability did not constitute a prior judicial construction of the WLAD. Rather, the court imported the definition from federal law. *Delaplaine*, 518 F. Supp. 2d at 1279. Because *McClarty* did not construe the WLAD, retroactive application of Senate Bill 5340 does not contravene a prior judicial construction of the statute.

Therefore, there is no separation of powers violation.

This analysis is consistent with well established principles of statutory construction. In *Johnson v. Morris*, 87 Wn. 2d 922, 927-928, 557 P. 2d 1299 (1976), this court stated:

> It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it. In other words, there is no "retroactive" effect of the court's construction of a statute; rather, once the court has determined the meaning, that is what the statute has meant since its enactment. (Citation omitted)

In *Pulcino*, 141 Wn. 2d 629, this court considered and decided the same issue it addressed six years later in *McClarty*. In *Pulcino* the court defined "disability," for purposes of an accommodation claim under the WLAD, as a sensory, mental, or physical abnormality that has a substantial limiting effect upon the individuals ability to perform his or her job. 141 Wn. 2d, at 641. Indeed, in *Pulcino* this court expressly refused to adopt the ADA definition of disability. *Id,* at 642. The *Pulcino* court addressed the same issue as *McClarty*. If the *Pulcino* court "construed" the WLAD in defining "disability," "that construction operates as if it were originally written into it." *Johnson v. Morris,* 87 Wn. 2d at 927. If the court subsequently

"reconstrued" the statute in *McClarty* then it did nothing more than engage in an act of legislation. That is clearly not the role of the court. See *Pulcino,* at 642; *Marine Power & Equipment Co. v. Washington State Human Rights Commission.* 39 Wn. App. 609, 615 n. 2, 694 P. 2d 697 (1985).

Therefore, *McClarty's* adoption of the ADA definition of disability cannot be characterized as a prior judicial construction of the WLAD. Because *McClarty* did not construe the statute, retroactive application of Senate Bill 5340 to pre-McClarty cases does not "threaten the independence or integrity or invade the prerogative" of the judiciary. Retroactive application of this statute does not violate the separation of powers doctrine. The trial court's decision to the contrary should be reversed.

3. Because retroactive application of Senate Bill 5340 does not require a court to set aside a final judgment, there is no separation of powers violation.

When separation of powers challenges are raised involving different branches of state government, only the state constitution is implicated. *State v. Blilie,* 132 Wn.2d 484, 489, 939 P.2d 691 (1997). However, this court relies on federal principles regarding the separation of powers doctrine in interpreting and applying the state's separation of powers doctrine. *Id.*; *State*

v. Wadsworth, 139 Wn.2d 724, 735, 991 P.2d 80 (2000); *Carrick v. Locke*, 125 Wn.2d 129, 134-135, 882 P.2d 173 (1994). Controlling federal precedent makes it clear that no separation of powers violation occurs with retroactive application of new legislation unless that results in the setting aside of a final judgment of a court.

First, it is clear that the legislative branch of government has the power to amend a statute and provide for retroactive application and thereby "undo what it perceives to be undesirable past consequences of a misinterpretation of its work product. *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 313 (1994); *See also, Marine Power & Equipment Co. v. Washington State Human Rights Commission Hearing Tribunal,* 39 Wn. App. 609, 694 P.2d 697 (1985). In *Rivers,* the plaintiffs filed suit alleging they had been terminated from employment on the grounds of race and retaliation in violation of 42 USC §1981. While plaintiff's claim was pending, the United States Supreme Court decided *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989), which held that §1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations. Id, at 171. The district court dismissed the claim, relying on *Patterson*, and the plaintiffs

appealed. While the appeal was pending, the Civil Rights Act of 1991 became law. *Rivers,* 511 U.S., at 302. That Act provided that §1981's prohibition against racial discrimination in the making and enforcement of contracts applies to all phases and incidents of the contractual relationship, including discriminatory contract termination. Id. The Supreme Court granted certiorari to determine whether the Civil Rights Act of 1991's definition of "make and enforce contracts" applied to cases pending at the time of enactment. Id., at 300.

The Supreme Court ruled that the statute did not apply retroactively. However, it confirmed that Congress could have done so if it had clearly expressed its intent to do so. The court observed that "[i]n the cases before us today, however, we do not question the power of congress to apply its definition of the term 'make and enforce contracts' to cases arising before the 1991 Act became effective, or, indeed, to those that were pending on June 15, 1989, when *Patterson* was decided. The question is whether Congress has manifested such an intent." *Id.,* at 311. The *Rivers* court explained further:

> *Congress, of course, has the power to amend a statute that it believes we have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive, and thereby undo what it perceives to be the undesirable past*

> *consequences of a misinterpretation of its work product.* No such change, however, has the force of law unless it is implemented through legislation. Even when Congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the "corrective" amendment must clearly appear.

311 U.S., at 313 (internal citations omitted) (emphasis added). *I.N.S. v. St. Cyr,* 533 U.S. 289, 316, 121 S. Ct. 2271, 150 L.Ed.2d 347 (2001) (Where Congress intends to do so, "it is beyond dispute that . . . Congress has the power to enact laws with retrospective effect.")

In enacting Senate Bill 5340, the legislature made its intent that it be applied retroactively to cases which arose prior to *McClarty* abundantly clear. [2007 c 317 § 3]. ("This Act is . . . retroactive and applies to all causes of action occurring before July 6, 2006.") The legislature had the authority, "within broad constitutional bounds, to make such a change retroactive, and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product." *Rivers,* 511 U.S., at 513. Therefore, the legislature acted within its constitutional prerogative in declaring that the new statutory definition of disability would apply retroactively to cases which arose prior to *McClarty.*

The only constitutional impediment to retroactive application of new legislation is that a legislature may not enact retroactive legislation requiring a court to set aside a final judgment. *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 240, 115 S. Ct. 1447, 131 L.Ed.2d 328 (1995). In *Plaut,* the U.S. Supreme Court considered whether amendments to the Securities and Exchange Act of 1934 which required federal courts to reopen final judgments in private civil actions alleging securities fraud violated the separation of powers doctrine. Prior to the amended legislation, the Supreme Court had decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 111 S. Ct. 2773, 1151 L.Ed.2d 321 (1991), holding that securities fraud litigation "must be commenced within one year after discovering of the facts constituting the violation and within three years after such violation." *Id.,* at 364, 111 S. Ct., at 2782. Congress responded to *Lampf* by enacting legislation which provided that any securities fraud litigation started before and dismissed as time barred after June 19, 1991 (the date of the *Lampf* decision), which would have been timely under the law existing on that date, was to be reinstated "on motion by the plaintiff not later than 60 days after December 19, 1991. See 15 U.S.C. § 78 aa-1 (1988 ed., Supp. V). The *Plaut* court held this retroactive legislation violated the

separation of powers doctrine because it commanded federal courts to reopen final judgments rendered in particular cases. 511 U.S., at 218-219. The court explained:

> It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. *See United States v. Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801); *Landgraf v. USI Film Products,* 511 U.S. 244, 273-280, 114 S.Ct. 1483, 1501-1505, 128 L.Ed.2d 229 (1994). . . But a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates; not a batch of unconnected courts, but a judicial *department* composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level must "decide according to the existing laws." *Schooner Peggy, supra,* 1 Cranch, at 109. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular

> case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was. . . .
>
> Not favoritism, not even corruption, but *power* is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons, such as the legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.

514 U.S., at 226-228.

It is clear, then, that retroactive application of legislation which disrupts or interferes with the final judgment of the judiciary in a particular case violates the separation of powers doctrine. In this circumstance, the legislature has threatened the independence and integrity and invaded the prerogative of the judiciary. *Carrick v. Locke,* 125 Wn.2d, at 135. However, retroactive application of Senate Bill 5340 to disability discrimination cases which arose prior to *McClarty,* and have not been reduced to final judgment, does not violate this principle. The instant case is illustrative. Mr. Hale's disability discrimination claim arose in 2002/2003, over three years prior to this court's decision in *McClarty.* It has not been reduced to final judgment

by the court. Therefore, retroactive application of the statutory definition of disability set forth in Senate Bill 5340 to this case does not, in any fashion, reverse a final judgment of the court.

Application of the new statutory definition of disability to Mr. Hale's disability discrimination claim does not threaten the integrity or invade the province of the judiciary because it interferes with no final judgment of any court. Therefore, there is no separation of powers violation. The decision of the trial court to the contrary should be reversed.

B. THE DECISION OF THIS COURT IN *MCCLARTY* VIOLATED THE SEPARATION OF POWERS DOCTRINE AND SHOULD BE REVERSED.

This court's essential function is to interpret the law, not to make the law. *Plaut v. Spendthrift Farms, Inc.,* 514 S.Ct., at 222-223. It is the function of the legislature to make the law. *Marine Power & Equipment v. Washington State Human Rights Commission,* 39 Wn. App., at 615, n. 2. This court's decision in *McClarty,* adopting the ADA definition of disability, violated this fundamental separation of powers principle.

This court's analysis in *Pulcino v. Federal Express Corp.,* 141 Wn.2d 629, compels this conclusion. In *Pulcino,* decided six years prior to

McClarty, the court expressly refused to adopt the ADA definition of disability. The *Pulcino* court explained at p. 641-642:

> We agree that many other states have more restrictive definitions that are the product of legislative decision. In Washington, our regulation focuses on "'sensory, mental, or physical disability' if it is an abnormality[.]" WAC 162-22-020(2). By requiring that such abnormality must have a substantially limiting effect upon the individual's ability to perform his or her job, we have ruled out the trivial. To go beyond that limitation and adopt either the federal definition or chose one from another state, would be to undertake a task more appropriate for the Legislature. "[T]he imperative to decide disputes needs to be tempered by due consideration of the judiciary's role as one of the three coordinate branches of state government." Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems,* 22 Seattle U.L.Rev. 695, 710 (1999).

In *Pulcino* this court recognized that adoption of the ADA definition of disability was peculiarly within the province of the legislature. Six years later in *McClarty* this court assumed the legislative function and arbitrarily took it upon itself to legislate the ADA definition of disability into the WLAD. Under this court's own analysis in *Pulcino,* this was a violation of the separation of powers doctrine. The court should correct that error, reverse

the decision in *McClarty,* and simply reaffirm the definition of disability set forth in *Pulcino,* consistent with the legislative enactment of Senate Bill 5340.

C. THE RECORD DEMONSTRATES THAT MR. HALE HAD A DISABILITY UNDER RCW 49.60.040(25).

RCW 49.60.040(25)(a) defines "disability" as "the presence of a sensory, mental, or physical impairment that:

(i) is medically cognizable or diagnosable;

(ii) exists as a record or history; or

(iii) is perceived to exist whether or not it exists in fact.

RCW 49.60.040(25)(c) provides in relevant part:

> (c) For purposes of this definition, "impairment" includes, but is not limited to:
>
> . . .
>
> (ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to, cognitive limitation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

The record demonstrates that Mr. Hale suffered from anxiety disorder and depression. These were mental impairments that were medically

cognizable and diagnosable, and existed in his medical records. Hale's treating physician, Dr. Robert Wigert, testified that he had a long-standing history of anxiety and depression that was being significantly aggravated by his work environment. (CP 283). This diagnosis was also reflected in two letters that Dr. Wigert provided to the district through Mr. Hale, notifying the defendant of Hale's disability and the effect of the work environment on his health. (CP 204, 276).

RCW 49.60.040(25)(d) provides:

> Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:
>
> (i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or
>
> (ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would

create a substantially limiting effect.

The evidence in the record demonstrates that Mr. Hale's anxiety disorder/depression had a substantially limiting effect on his ability to perform his job. Hale's August 25, 2002 letter to Mr. Riedlinger demonstrates this. Dr. Wigert's December 20, 2002 letter "To Whom it May Concern" further demonstrates this.

Moreover, Mr. Hale put the District on notice of his impairment with his August 25, 2002 letter to Mr. Riedlinger. Dr. Wigert's December 20, 2002 letter "To Whom it May Concern", which was provided to the School Board, and Superintendent Riedlinger, was medical documentation establishing "a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect." RCW 49.60.040(25)(d)(ii)

Whether an employee has/had a disability is generally a question for the trier of fact. *Pulcino v. Federal Express Corp.,* 141 Wn.2d 629, 642 P.3d 787 (2000); *Phillips v. City of Seattle,* 111 Wn.2d 903, 766 P.2d 1099 (1989). In the instant case, Mr. Hale's own testimony, combined with the testimony of Dr. Wigert, and the documentation from Dr. Wigert is more than sufficient to demonstrate a genuine issue of material fact concerning whether Hale had

a disability under RCW 49.60.040(25). *Pulcino,* 141 Wn.2d at 642-643. This factual question precludes summary judgment, and the trial court's decision should be reversed.

D. THE RECORD SUPPORTS A FINDING THAT MR. HALE HAD A DISABILITY UNDER THE DEFINITION OF THAT TERM ADOPTED BY *MCCLARTY.*

Assuming arguendo that the *McClarty* definition of disability applies to this case, the record supports a finding that Mr. Hale had a disability under the WLAD. Under *McClarty*, the plaintiff establishes a disability if he has (1) a physical or mental impairment that substantially limits one or more of his major life activities, (2) a record of such impairment, or (3) is regarded as having such an impairment. 157 Wn. 2d, at 220. The evidence in this case demonstrates that plaintiff Hale had a diagnosed mental disorder - anxiety and depression - that substantially limited major life activities, including sleeping and working. The record contains testimony and documentation from Mr. Hale's treating physician, Dr. Wigert, establishing that plaintiff suffered from anxiety and depression which was markedly exacerbated by the work environment. Dr. Wigert was treating Hale's diagnosed depression/anxiety with medication. (CP 285-286)

Mr. Hale's August 25, 2002 letter to Wellpinit Superintendent Reid Reidlinger states in part:

> His (supervisor) attacks....have begun to bother me physically in that I become nauseated when I talk to him. My stomach aches for hours after phone conversations and after the worst calls, I have trouble sleeping.

(CP 201).

While this court in *McClarty* defined disability as a condition that "substantially impairs a major life activity," it offered no guidance with respect to the meaning of that standard under the WLAD. Federal courts have held that sleeping and working are major life activities for purposes of determining disability under the ADA. See, *Humphrey v. Memorial Hospital Assoc.,* 239 F. 3d 1128 (9th Cir. 2001). In *Humphrey* the Ninth Circuit explained:

> An impairment "substantially limits" one's ability to carry out a major life activity if, because of the impairment, the individual is "significantly restricted as to the condition, manner, or duration under which an individual can perform a major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. §1630.2 (j).

239 F. 3d, at 1135.

Dr. Wigert's and Mr. Hale's testimony demonstrate that Hale suffered from anxiety, depression, and resulting bouts of nausea that substantially impaired his ability to sleep and work. The average person in the general population does not suffer from sleep deprivation or impaired work capacity, because of anxiety and depression. Therefore, under the federal standard articulated by *Humphrey,* and expressed in the federal regulation, Mr. Hale's anxiety and depression substantially limited his major life activities of sleeping and working. The record demonstrates sufficient evidence to support a finding that Mr. Hale had a disability, even under the more restrictive definition of that term adopted by this court in *McClarty.*

Further, it must not be forgotten that, even though *McClarty* looked to the ADA for the definition of disability, Mr. Hale brings his disability discrimination claim under the WLAD. The statute mandates that it be construed liberally for the accomplishment of its beneficial purposes. RCW 49.60.020. A statutory mandate of liberal construction requires that courts view with caution any construction that would narrow the coverage of the law. *Marquis v. City of Spokane,* 130 Wn. 2d 99, 922 P. 2d 43 (1996). While this court will look to federal anti-discrimination laws for guidance in interpreting the WLAD, it has not hesitated to reject federal authority when

that law fails to provide the broad protection against employment discrimination mandated by the WLAD. *Marquis,* 130 Wn. 2d, at 110-111. Having adopted the ADA definition of disability in *McClarty,* this court must now give some meaning to the term "substantial impairment of major life activity," in the context of the WLAD, for those cases still subject to *McClarty* after the enactment of Senate Bill 5340. Federal cases which provide a narrow, restrictive interpretation of that term under the ADA are not helpful in defining its meaning under the WLAD.

The record contains substantial evidence that Mr. Hale suffered from anxiety disorder and depression which substantially impaired his major life activities of sleeping and working. This evidence is sufficient to demonstrate a genuine issue of material fact concerning whether Hale had a disability under the WLAD, even applying the more restrictive definition of that term adopted in *McClarty.* This factual question precludes summary judgment. Even applying *McClarty,* the trial court erred in granting summary judgment and dismissing plaintiff's disability discrimination claim. That ruling should be reversed.

E. THE RECORD DEMONSTRATES GENUINE ISSUES OF MATERIAL FACT CONCERNING WHETHER DEFENDANT

BREACHED ITS DUTY TO TAKE POSITIVE STEPS TO REASONABLY ACCOMMODATE PLAINTIFF'S DISABILITY.

Under the WLAD, an employer owes an affirmative duty to take positive steps to reasonably accommodate a disabled employee. *Holland v. Boeing Co., supra.* The duty to accommodate arises when the employer becomes aware of the employee's disability. *Goodman v. Boeing Co.*, 127 Wn.2d 401, 899 P.2d 1265 (1995). Once the employer has notice of the employee's disability, it owes a duty to take positive steps to accommodate his limitations. Id., at 408. Reasonable accommodation "envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the employer's capabilities and available positions." *Goodman*, at 409.

Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. *Barnett v. U.S. Air*, 228 F.3d 1105, 1114 (9th Cir. 2000). The interactive process requires communications and good faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process. Id., at 1114-1115. An

employer fails to engage in the interactive process as a matter of law where it rejects an employee's proposed accommodations and offers no practical alternatives. *Humphrey v. Memorial Hospitals Assn., supra*, at 1139; *Barnett*, supra, at 1116-1117.

The evidence in the instant case demonstrates that Defendant Wellpinit simply ignored the Plaintiff and his physician when they provided clear notice of Mr. Hale's disability, and the effect of the workplace environment on his condition. Plaintiff notified Superintendent Riedlinger of his depression and anxiety disorder in his August 25, 2002 letter. He advised Riedlinger he was seeking medical attention for his symptoms, and asked Riedlinger to intervene in some fashion to assist in resolving the workplace conditions, which were exacerbating his symptoms. In early January 2003, Mr. Hale wrote to the Wellpinit School Board and Mr. Riedlinger, and again advised them that the working conditions were making him ill, and asked for intervention. He enclosed a note from his physician confirming his diagnosis of anxiety and depression, and indicating that the working environment was exacerbating Hale's symptoms.

Superintendent Riedlinger could not recall taking any steps to respond to Mr. Hale's August 25, 2002 letter. (CP 201) Hale testified Riedlinger

conveyed his "sympathies." (CP 185-186). The evidence demonstrates the School Board and Mr. Riedlinger ignored Mr. Hale's January 3, 2003 letter, and the enclosed notes from Dr. Wigert. Mr. Hale then made a specific request for intervention from the district psychologist, which again fell on deaf ears and was ignored. (CP 191-193).

This evidence is more than sufficient to demonstrate a factual question concerning whether Defendant Wellpinit breached its duty to take positive steps to accommodate Plaintiff's disability. The evidence supports a finding that Defendant failed to engage in the interactive process, and therefore, unlawfully discriminated against Plaintiff because of his disability as a matter of law. *Humphrey*, supra, *Barnett*, supra.

Defendant Wellpinit argued to the trial court that it had no duty to accommodate Mr. Hale by providing him a different supervisor. *Snyder v. Medical Service Corp.,* 145 Wn.2d 233, 35 P.3d 1158 (2001). Defendant's legal assertion is correct. However, Defendant misrepresents the record. Plaintiff Hale never asked his employer to provide him with a different supervisor. Rather, the record reflects that Mr. Hale notified the district of his disability, explained that the working environment was severely exacerbating his symptoms, and begged the superintendent to intervene in

some fashion to relieve the conditions which were making him increasingly ill. Defendant simply ignored the Plaintiff when he notified them of his health condition and increasing symptoms. Reasonable accommodation anticipates an exchange between the employer and employee. *Goodman v. Boeing Co.*, supra. As long as a reasonable accommodation available to the employer could have plausibly enabled a disabled employee to adequately perform and keep his job, an employer is liable for failing to attempt that accommodation. *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 879 (9th Cir. 1989).

Contrary to Defendant's argument, Mr. Hale never asked for a change in supervisors. He simply asked that Mr. Riedlinger intervene in some fashion to alleviate the working conditions, including the stress between Plaintiff and his supervisors, which were exacerbating Plaintiff's symptoms and rendering him increasingly disabled. Defendant ignored Plaintiff's requests for assistance. It failed to engage in any interactive process. It failed to even attempt accommodation by intervening to resolve the tension between Plaintiff and his supervisors.

Plaintiff made no request for a change in supervisors. He notified his employer of his disability, and asked for accommodation by way of

intervention. Defendant ignored Mr. Hale and took no positive steps to accommodate his disability. The record demonstrates a factual question concerning whether Defendant breached its duty to take positive steps to accommodate Plaintiff's disability. The trial court's order granting summary judgment and dismissing plaintiff's disability discrimination claim should be reversed.

IV. CONCLUSION

Petitioner respectfully requests this court to hold that retroactive application of Senate Bill 5340 to disability discrimination cases which arose prior to *McClarty v. Totem Electric* does not violate the Separation of Powers doctrine. Further, the record demonstrates genuine issue of material fact concerning (1) whether Mr. Hale had a disability under the WLAD, and (2) whether defendant Wellpinit School District breached its duty to reasonably accommodate his disability. Those factual questions preclude summary judgment. Petitioner respectfully requests the court to reverse the decision of the Stevens County Superior Court, and remand his claim of disability discrimination under the WLAD to the trial court for trial on the merits.

RESPECTFULLY SUBMITTED this 18 day of April, 2008.

PAUL J. BURNS, P.S.

By: _____
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Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 18 day of April, 2008, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

Michael E. McFarland Evans, Craven & Lackie 818 West Riverside, Suite 250 Spokane, WA 99201-0910	____ VIA REGULAR MAIL ____ VIA CERTIFIED MAIL __X__ HAND DELIVERED ____ BY FACSIMILE ____ VIA FEDERAL EXPRESS

PAUL J. BURNS